Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

January Term, 1999

KERMIE M. KING,

Petitioner,

v.

HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A. As a matter of law is an employee judicially estopped from pursuing a claim of age discrimination in employment by virtue of having received Social Security Disability Benefits sometime after having been discharged from employment?

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OPINIONS BELOW

The decision entered by the United States Court of Appeals for the Fourth Circuit dated October 30, 1998, affirming the Summary Judgment granted the Respondent by the United States District Court for the Southern District of West Virginia, which Order is appended as Appendix 1.

JURISDICTION

The United States District Court for the Southern District of West Virginia held that the Court had subject matter jurisdiction over the plaintiff's action pursuant to 28 U.S.C. §1441 and 29 U.S.C. §1144(a). The action was brought under the provisions of the West Virginia Human Rights Act and alleged damages, including a loss of employee benefits, consequent to the acts of discrimination committed against plaintiff. The plaintiff is a resident of the State of West Virginia. The defendant is a domestic not-for-profit corporation which has its principal offices and hospital facility located and situate in the State of West Virginia.

The District Court's decision granting the defendant hospital summary judgment was before the Fourth Circuit Court of Appeals for review pursuant to 28 U.S.C. 1291, as amended. It is from this decision of the United States Court of Appeals for the Fourth Circuit that Petitioner now appeals pursuant to 28 U.S.C. §1254(1).

LAW INVOLVED

The law involved in this matter is predicated upon employment discrimination in violation of Title VII of the Civil Rights Act of 1964 and a denial of her rights in contravention of 42 U.S.C. §1983 and the Age Discrimination in Employment Act (ADEA).

STATEMENT OF THE CASE

This is a civil action brought pursuant to the West Virginia Human Rights Act for acts of age discrimination committed against Petitioner, Kermie Marie King (hereinafter referred to as "Mrs. King"). The Petitioner was an employee of Thomas Hospital for twenty-five (25) years until September 9, 1987 when she was summarily terminated for

allegedly falsifying a time card on August 29, 1987.

Thomas Hospital claimed Mrs. King was seen getting into her vehicle at 2:26 p.m. in spite of having actually signed out on her time card as leaving work at 2:30 p.m. The hospital contended that this infraction of falsifying a time card demanded immediate termination of Mrs. King's employment pursuant to the hospital's personnel policy at that time.

Mrs. King contended that the hospital gave this pretextual reason for her termination in order to rid itself of an older employee who had begun to encounter the expected physical problems associated with aging and who was approaching retirement age. Mrs. King further contended that the hospital's policy and procedures allowed employees a "grace period" of five to seven minutes in arrival or departure from work and that termination was not the only action possible for the hospital to have taken. Mrs. King further contended that the hsopital unlawfully discriminated against her on the basis of her age in contravention of the West Virginia Human Rights Act, §§5-11-1 et seq of the West Virginia Code.

On March 9, 1995, Mrs. King filed her Original Complaint in the Circuit Court of Kanawha County, West Virginia. On April 5, 1995, Thomas Hospital served a Notice of Removal based upon an assertion that the allegation of loss of employee benefits and interference in the subject employee's benefits made this cause of action colorable and thus, totally under the control and auspices of the Employee Retirement Income Security Act (ERISA) and, therefore, removable to a federal jurisdiction.

On August 22, 1996, the United States Court for the

Southern District of West Virginia entered a Memorandum Order granting in part and denying in part Thomas Hospital's Motion For Summary Judgment. The Court denied Thomas' motion insofar as the same pertained to Count I, age discrimination, and denied the motion without prejudice to allow further development of the sole issue of judicial estoppel as a per se bar to the claim of age discrimination. The Court granted the hospital's motion for summary judgment in reference to Count II, wrongful discharge, Count III, intentional infliction of emotional distress, and Count IV, a claim for violation of ERISA.

On August 23, 1996, Thomas Hospital filed a second Motion For Summary Judgment. On December 12, 1996, the Court entered its Memorandum Order and Judgment Order granting Thomas Hospital's Motion for Summary Judgment on Count I, Age Discrimination, based on the Petitioner being judicially estopped by an application for, and an award of, Social Security Disability Benefits.

STATEMENT OF THE FACTS

Kermie Marie King was an employee at Herbert J. Thomas Memorial Hospital for twenty-five (25) years. On September 9, 1987, the plaintiff in this case was terminated for alleged falsification of her time card which occurred on August 29, 1987. The hospital asserted that two employees, Dee Bartoe and Darlene Kestner, saw Mr. King enter her vehicle in the parking lot at 2:26 p.m. on August 29, 1987, after signing out on her time card as having left work at the normal time of 2:30 p.m. This four (4) minute discrepancy was contended by the employer to be a serious act of

dishonesty and a violation of the personnel policy of the hospital which always requires the immediate termination of any offending employee.

The Petitioner on the other hand was unaware of such rigid and severe enforcement of the subject hospital policy and had on a few other occasions during her tenure with the hospital signed out five minutes or less before her actual quitting time without any repercussions or reprimand. Mrs. King contended that there existed a five to seven minute "grace period" regarding signing in or out and, further, was aware of other employees who routinely were permitted various degrees of latitude in signing in or out on the time card, even beyond the few minutes difference at issue in the instant case.

Mrs. King submitted in opposition to defendant's Motion For Summary Judgment evidence of the disparate treatment of older employees in the form of an affidavit and a sworn statement by two employees, Harry Roberts, a co-worker, and Reba Wagner, a supervisor with thirty-five years of service with Thomas Hospital, who attested to the discriminatory treatment meted out to older employees who were approaching age 55 and older.

It was discovered after filing the subject litigation that six months prior to the incident leading to Ms. King's termination, the hospital, for some unknown reason, had computed her early retirement pension rate. This calculation of retirement benefits clearly included a comparison of the amount of an early retirement pension in contrast to full retirement benefits on the normal retirement date. The calculation shows that an early retirement amount would reduce a pension amount by more than one-half of its value.

Mrs. King did not request this computation. Moreover, said computation was done shortly after the director of personnel, Donna Arbogast, was made aware that this particular employee needed an accommodation of her work routine to allow her to sit and get off of her feet for short periods of time rather than stand for her entire 8-hour work shift.

Ms. Arbogast memorialized in a letter to Mrs. King's doctor that any such work accommodation allowing Mrs. King to take breaks and not continually stand, was not possible at the hospital in question. Ms. Arbogast was at the time of Mrs. King's termination the hospital's personnel director who countermanded the plaintiff's immediate supervisors and mandated termination instead of the written reprimand or warning as initially recommended and undertaken by Margaret Eagloski, an eight year employee, who was Mrs. King's supervision. Mr. Eagloski likewise was unaware of the mandatory termination policy despite being in a management position as acting director of the dietary department.

Based upon the aforementioned evidence as well as other evidence offered by the Petitioner in support of her allegations of age discrimination, the district court denied the hospital's motion for summary judgment without prejudice as to Count I in her Complaint for Age Discrimination. The Court proceeded on August 22, 1996, to require further development of only the hospital's argument that Mrs. King was judicially estopped from pursuing this claim of age discrimination based upon an award of Social Security Disability Benefits fifteen (15) months after being fired, which award was backdated to approximately the time of her

termination from her employment. The hospital argued that this award of disability benefits completely destroyed the claim for age discrimination and barred it from being brought to trial on the basis of judicial estoppel.

On December 12, 1996, the district court entered an order ruling that Mrs. King was judicially estopped from pursuing her claim for age discrimination and dismissed the one remaining count in favor of the defendant hospital.

REASON FOR GRANTING WRIT

I. Redress of a claim of age discrimination committed against an employee of advanced age cannot be subject to a per se bar based on the doctrine of judicial estoppel by virtue of soley an award of Social Security Disability Benefits.

The District Court erroneously granted summary judgment as a matter of law to the defendant hospital, Thomas Memorial, by wrongly applying the doctrine of judicial estoppel in this matter.

The Petitioner submits that the extension and application of the legal principle of judicial estoppel, which has been successfully utilized to bar handicapped plaintiffs from pursuing claims for handicap discrimination based on applications for Social Security Disability Benefits, is inappropriate to the circumstances in this case. It is both legally unsound and an inequitable miscarriage of justice when applied to an older employee who was involuntarily terminated because of age discrimination, and is unable to secure other employment in a competitive labor market because of multiple contributing factors, including not only her age and physically handicapping limitations, but also an

employment record reflecting that she was terminated because of alleged dishonesty.

The application of judicial estoppel to thwart this older employee from proceeding to a trial on the merits of her claim for age discrimination cannot be factually or legally supported, primarily as the Petitioner was working without significant complaint by this employer regarding her actual job performance when fired by the employer/defendant. Further, she attempted to find suitable employment for which she was qualified for months following her termination and only applied for benefits upon being unsuccessful in obtaining other employment. It was Mrs. King's intention to continue her employment until normal retirement age even with her physical impairments and "but for" the discriminatory acts of the defendant would have done so.

Being "unable to work" for the purposes of eligibility for Social Security Disability Benefits does not exclude the reality of an individual still being able to perform the essential functions of a particular position, both with or without reasonable accommodation. It is legally unsound and inequitable to apply judicial estoppel to dismiss an action for age discrimination based on the naked award of such benefits.

The Social Security Act statutorily allows for a combination of vocational-medical criteria to formulate the basis for an award of disability benefits and this can not establish prima facie evidence of an inability to perform previous job functions, especially when a handicapped elderly person has the desire to, and is motivated to, continue to work.

At the time of her termination by the hospital, this Petitioner was an older employee who was 58 years of age,

and was performing her job satisfactorily for the hospital. Mrs. King asserted that she was terminated by Thomas Hospital for the sole reason that she was an elderly employee who did have a handicapping condition. Mrs. King was no longer going to be able to perform her job duties without minor accommodations.

Mrs. King neither applied for disability retirement nor any other disability benefits when terminated by Thomas Hospital, nor did this hospital even consider retirement under a disability pension pursuant to any provisions of their employee benefits plan when terminating this employee. Additionally, as is evidenced by the unsolicited computation of her pension benefits, the Petitioner would have drawn a substantially higher pension had she retired at her normal retirement age.

Therefore, it is not in the interests of either justice or fairness to dismiss all consideration of the material issues between these parties pertaining to the alleged acts of age discrimination predicated solely on an after-acquired award for disability benefits sought months after fruitless efforts to acquire another job, with her Social Security Disability Insurance benefits, sometimes hereinafter referred to as "SSDI" benefits, being granted over 15 months after the complained of actions by this hospital against this employee.

On August 23, 1996, Thomas Hospital again renewed a motion for summary judgment based upon an argument that judicial estoppel barred Mrs. King's claim for age discrimination which had already survived a previous motion for summary judgment by the hospital based on the argument that no material issues existed between the parties.

Thomas Hospital's pleading to judicially estop this cause of action was based solely upon an award of Social Security Disability Benefits which was granted more than a year and three months after the hospital terminated Mrs. King's employment.

During the 15 months between being fired and being awarded her SSDI benefits, there was clear evidence submitted to the Court of Mrs. King's attempts to secure reemployment. There was further evidence submitted showing that during said 15 month period the Petitioner had been awarded unemployment benefits by the State of West Virginia based upon her being both willing and able to work and during which she was actively seeking reemployment. Unemployment benefits cannot be awarded in West Virginia to any individual who will not agree to seek reemployment or accept employment if offered. This evidence was not rebutted by Thomas Hospital.

This is a case of age discrimination which must not be obscured and confused by any defense argument which cites precedent which focuses on claims of disability discrimination and the ADA and which entails very defined, but significantly different legal issues. To involuntarily terminate an older employee because she is of an advanced age is unlawful, and cannot be diminished or legally justified by an after-the-fact award of any disability benefits, particularly awarded more than a full year after such illegal conduct occurred, which conduct rendered the employee unemployed and quite possibly unemployable by virtue of the nature of the termination.

No equitable application of judicial estoppel would factually support such a ruling in a case as is presently before

this Court. Mrs. King's age combined with a physical impairment, together with an employment record that showed that she was terminated involuntarily due to her alleged dishonesty with her previous employer, significantly interfered with successful reemployment, which in no way is dispositive of her ability or inability to maintain and perform her past employment.

The seeking of employment at an advanced age for almost a full year after being fired makes the issues at hand completely separate and totally unlike any ADA claims as based upon a defendant's failure to accommodate a handicap which directly leads to a cessation of a plaintiff's employment. Allegations that an employer did not accommodate a handicap, thus leading to discharge, are not the issues upon which this case was built. This case is about wrongfully discharging an employee on a clearly pretextual reason to rid the defendant hospital at a bargain basement monetary rate of the liabilities and economic responsibilities owed to an older employee approaching full retirement, an act which saved this hospital a significant amount of money because of the dramatically reduced pension Mrs. King receives, as well as the loss of the other benefits to which she would have been entitled had she worked until her normal retirement age.

The failure of this hospital to allow this older employee to occasionally sit down on regularly scheduled breaks, instead of standing throughout the full eight hours of her work day, was evidence of the Respondent's clear intentions to create an intolerable work environment for this loyal and long time employee who was known by the Respondent to be experiencing the effects of arthritic legs and

feet. It was always an issue of age discrimination and intentional harassment to hasten this employee to end her employment before the normal retirement date.

The purpose of the doctrine of judicial estoppel is to protect the integrity of the judicial process. Accordingly, the doctrine of judicial estoppel is an equitable doctrine invoked by a court at its discretion. Yanez v. U. S., 989 F. 2d 323, 326 (9th Cir. 1993) [quoting Morris v. California, 966 F. 2d 448, 452-53 (9th Cir. 1991)]. Its purpose is clearly not the expeditious demise of meritorious age discrimination claims by virtue of a naked defense such as the plaintiff simply having received some type of disability benefits after the fact must stand as a per se bar to her claim of unlawful discrimination.

Kermie Marie King did not resign her job nor did she seek disability benefits until long after she found herself unemployable and without any reasonable means to secure new employment after being fired from her job by this Respondent. This does not, by any reasonable application of judicial estoppel, prove a prima facie case that Mrs. King was unwilling or unable to continue with her former employment at Thomas Hospital at the time of her discharge over a year earlier, nor that she was unable to perform the essential functions of that job, it only shows that there came a point after Mrs. King was fired that she elected to apply for disability after unsuccessful efforts to acquire another job.

At no time did Petitioner apply for disability benefits through the Respondent, nor seek any other disability benefits after she was discharged. Mrs. King was terminated for alleged fraudulent conduct, conduct which Mrs. King contends had been tolerated and, in fact, openly permitted

other younger employees. The facts surrounding this discharge were not remotely dependent on issues of any inability to perform the job at issue or an unwillingness to continue working because of any physical problem or condition. In fact, Mrs. King had a friend call the personnel office the day after being fired to see when she could return to work. She did not even understand the serious action taken against her.

The Respondent has misused, abused, and widened the recent defenses utilized in ADA cases and other handicap discrimination cases to encompass and thwart this cause of action pertaining to age discrimination. Petitioner in this matter was not terminated by the employer because she was not satisfactorily performing her job at Thomas Hospital. Both of Mrs. King's supervisors, Donna Arbogast and Darlene Kestner, testified in their respective depositions that Mrs. King was a valued employee with no significant problems regarding her job performance. Petitioner in this action has brought suit against her former employer for terminating her upon a bogus, pretextual reason to rid itself of an older employee. This termination occurred at a time when reemployment would have been difficult even without the added obstacle of being fired for "gross misconduct" involving her honesty.

In this matter Mrs. King neither quit her job nor voluntarily thrust herself back into the competitive labor market in the face of her advanced age, limited education, narrow manual labor skills, and arthritis, all to her undeniable disadvantage and detriment in possibly being able to secure another job. The Respondent unlawfully forced that upon her.

Now, this employer has secured legal absolution of its acts by argument that when Mrs. King was faced with months of unemployability for approximately a year after being fired, the Petitioner's right to any relief for the wrongs done to her by the employer were totally lost upon her mere application for, and subsequent award of, Social Security Disability Benefits. This application for benefits followed almost a year of Mrs. King unsuccessfully seeking reemployment. This unemployability was the direct result of the very circumstances set into motion by this hospital and the claim for benefits was decided upon grounds that do not prove that Mrs. King could not perform her job at Thomas Hospital or even stated that she was unable to perform that job.

"But for" the discrimination committed against this older employee, Mrs. King would not have needed the employment which she sought, but was unable to secure. The Respondent offered absolutely no evidence to contradict this fact. Whatever may have occurred for over a year following termination cannot legally excuse this employer's wrongful and unlawful act in September, 1987, nor should it now fortuitously be utilized to form a legal foundation upon which to build a successful defense related to judicial estoppel to defeat a meritorious claim of age discrimination.

In this instance, not only the Petitioner's physical condition was considered to determine her eligibility for SSDI benefits, but also her education, lack of other marketable skills and, most importantly, her age, all were utilized to establish the statutory basis for an award of disability as defined by the Social Security Act. This fact can not cancel out the hospital's discriminatory actions nor stand as any proof that this Petitioner has sworn to inconsistent positions

to gain some unfair advantage. The Petitioner's circumstances stand as evidence of the egregious harm done to her by virtue of an unlawful termination of her employment, which employment she was successfully maintaining despite all of the aforementioned conditions.

In Wells v. North Carolina Board of Alcoholic Control, 714 F. 2d 340 (4th Cir., 1983), cert. denied, 464 U.S. 1044 (1984), the Appellate Court held that it would not limit the award of damages to a plaintiff who subsequently suffered a back injury, sought light duty from an employer, was refused, and quit. The Court held that "but for" the employer's discriminatory behavior the plaintiff would not have quit his employment and suffered monetary damages. "But for" the discriminatory acts of this Respondent, in unlawfully terminating Mrs. King's employment, Petitioner would not have been out seeking employment that she could not find.

The employer sought legal vindication for its wrongful conduct of illegally discriminating against an older employee, resulting in her inability to continue to support herself. It sought this legal absolution through fortuitous judicial estoppel argument borne of Petitioner's after-acquired award of SSDI benefits to ameliorate the very damages arising out of and directly resulting from the Respondent's own actions the year before. The very nature of this termination on grounds of gross dishonesty constituted a serious barrier to any individual's securing other employment, placing a serious indelible black mark upon her which would be hard to overcome for even a younger and more desirable prospective employee.

An application for disability benefits in this case in no

way proves that this plaintiff stated she could not perform any work in September, 1987, nor was there any underlying cause for this termination in September, 1987, based upon any allegations of deficient work performance or inability to perform in Thomas' dietary department. In fact, for almost a full year, Mrs. King actively sought reemployment, received unemployment benefits based upon her capability and availability for work, and never by word, deed or action indicated that she could not work. Whatever statements were made by Mrs. King after a year of unemployment and inability to secure a new job can not contradict, diminish, or legally excuse this employer for unlawfully discharging Mrs. King the year before and causing the very harm inflicted upon her by the repeatedly documented false allegations that she was dishonest and had been fired for "gross misconduct" which ultimately contributed to the need to apply for disability benefits.

This is neither similar to any precedent as was previously cited by Thomas Hospital in its memorandum in support of summary judgment, nor is it equitable in the eyes of any fair interpretation of the anti-discrimination laws. The circumstances in this case are far removed from the defenses being utilized by defendants to defeat ADA causes of action wherein a plaintiff seeks damages for loss of a particular job that he could not, or chose not to, perform at the very time of the termination of that job. Mrs. King had no such option of working or not working and, in truth and fact, was performing her job satisfactorily when fired based upon a pretext of gross misconduct.

The fact that Mrs. King could not overcome the adverse circumstances created by being discharged for

dishonesty, her advanced age, limited work experience, limited job skills, and physical problems after a year of seeking employment, should not be permitted to be the legal foundation for dismissal of this action on behalf of the hospital who caused such hardship and losses which ultimately forced Mrs. King to apply for benefits. Such a ruling, wherein age is a central material issue and also a determining factor in possible eligibility for benefits, eviscerates the legal core of the majority of age discrimination actions and reduces them to a point of being ineffectual and legally meaningless.

Employers could simply illegally terminate older employees and then await the economic realities and hardship of being fired at a time close to retirement, which are inevitably created by forcing the older employee back into the labor market at such time, to require that employee to apply for particular benefits, such as employer sponsored disability benefits or SSDI benefits. In essence, the very damages created by the employer's wrongful acts and the hardship they create would serve to free the employer from any liability for such unlawfully conduct. The cost and penalties for employment discrimination against the older employee would simply be passed along to some other source besides the employer at fault by simply waiting for the possible application for certain benefits and related financial relief.

In the majority of the precedents wherein a defendant has invoked judicial estoppel to bar actions for handicap discrimination, the plaintiffs at issue, either before or immediately upon cessation of their job, sought total and permanent disability benefits of one kind or another. These plaintiffs, each and every one, either by action, application,

or sworn statement clearly avowed the inability to perform any work at the very same time that they were litigating the employer's failure to accommodate their handicaps so that they could presumably work. Many courts have invoked judicial estoppel to bar such causes of actions brought under ADA because of what these courts deem to be these inconsistent positions as taken by plaintiffs.

Regardless of the validity of such argument or the equity in such court rulings, it is absolute that each case must be carefully decided upon a thorough review of the particular circumstances and facts intrinsic to each specific case. "Application of the doctrine of judicial estoppel always is factually driven." McNemar v. The Disney Store, Inc., 91 F. 3d 610 (3rd Cir., 1996).

It is, therefore, incumbent in adjudicating any matter potentially invoking judicial estoppel to bar a cause of action to carefully examine very closely every relevant fact and circumstance surrounding and underlying the subject action to determine if, in fact, an inconsistent position has been taken by the plaintiff to deliberately thwart the purposes of justice and equity in that particular matter. It has been consistently followed by each court that careful consideration be given each individual case.

As cited in Lowery v. Stovall, 1996 WL 439236 (4th Cir. Aug. 6, 1996), "[J]udicial estoppel is properly defined as a bar against the alteration of a factual assertion that is inconsistent with a position sworn to and benefitted from in an earlier proceeding." Mark J. Plumer, Note, Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 Geo. Wash. L. Rev. 409, 435 (1987).

In Lowery certain necessary elements that must be

met before applying judicial estoppel were set forth by the Appellate Court. These elements are as follows:

1) The party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance regarding a factual matter taken in a previous litigation.

2) The prior inconsistent position must have been relied upon and accepted by the court.

3) Finally, the party sought to be estopped must have intentionally misled the court to gain unfair advantage. This precludes the application of judicial estoppel in any matter where it is determined by the Court that a party's prior position was based on mere inadvertence or mistake.

Petitioner submits that there is no evidence supportive of any inconsistent stance taken by her in this matter remotely justifying a bar to her cause of action for age discrimination, nor can any deliberate intent to mislead or gain unfair advantage be attached to this plaintiff as contemplated by Lowery, supra. Petitioner's award of Social Security Disability Benefits fifteen (15) months after being fired is evidence of the Petitioner's year of unemployability due to her age, limited work skills, education, and incapability due to arthritic feet and legs, and an employment record that reflects that she was terminated for gross misconduct involving her being dishonest. The application for disability benefits occurred many months after being fired and seeking reemployment. It is evidence of the harm done the plaintiff, and does not stand as any inconsistency in the positions she has taken in any forum.

Mrs. King, actively sought employment and was herself both clearly willing and available for work by virtue of the acceptance and receipt of unemployment benefits. By

neither her actions nor her statements at the time of discharge, or for any substantial time thereafter, did she ever take the position that she could not perform the essential functions of her job. Almost a year following discharge by this hospital, and finding herself still without employment and income at that late date, Mrs. King did seek disability benefits upon advice of her sister. Petitioner testified to this in her deposition of April 24, 1996.

Moreover and legally most importantly, this after-acquired benefit is not awarded on disability alone, but is statutorily determined on physical impairment in light of such vocational/medical criteria as age, work skills, and reasonable employability in the local competitive labor market. It would be impossible to sever the affect of an individual's age upon compensability under Social Security, particularly in this case, and to deny that age adversely diminished the ability to acquire and sustain gainful work activity as defined by Social Security.

The Social Security Act has long recognized this basic reality which the district court dismissed and overlooked in this matter to grant its dismissal of this action. The Petitioner's arthritic limbs did not, in and of themselves, determine this award of SSDI benefits, but rather the totality of the vocational/medical criteria determined the award. This in no way relegates the likelihood of her continued successful employment at her previous job inconsistent to Mrs. King's position in obtaining SSDI benefits over a year later.

The Respondent presented not one scintilla of evidence to show that Mrs. King was not satisfactorily performing her job at Thomas Hospital at the time the defendant fired her. Upon the record, it is abundantly clear

from Respondent's own disclosures that Mrs. King was receiving satisfactory evaluations all the way up to and including the time of her termination.

Mrs. King certainly never uttered one statement upon discharge that she could not work. In fact, upon being terminated as previously cited, she requested a friend call the personnel office to see when she might return to work, not comprehending that she had been fired. This has been placed in evidence by virtue of the testimony of plaintiff's friend at the Unemployment Hearing.

In McNemar v. Disney Stores, supra, plaintiff McNemar, immediately upon his dismissal, applied for and received New Jersey state disability benefits, Social Security disability benefits, and an exemption from repayment of a student loan because of a stated inability to maintain gainful employment. More importantly, plaintiff McNemar and his doctors, under penalty of perjury, swore that McNemar had been totally and permanently disabled for at least five weeks before he was discharged by Disney.

This case was a cause of action brought under ADA by a young man who alleged, under oath, he was totally unable to work even before he was discharged. This case is as dissimilar from the instant matter as legally and factually possible and in no way parallels the case at hand.

In August v. Offices Unlimited, Inc., 981 F. 2d 576 (1st Cir. 1992), the plaintiff was a salesman who suffered from severe clinical depression. As a result of his severe depression, he asked for and received a six week leave of absence from his job. August requested and received another two weeks sick leave to more fully recuperate.

After eight weeks of paid sick leave, August requested

to return to work on only a parttime basis. His employer refused this request and suggested he apply for company disability benefits if he could not return to work full-time. The plaintiff August before his scheduled return to work did apply for a claim under the company's disability plan. He asserted in the application for this benefit that he was totally and continuously disabled at the precise same time he was presumably seeking to return to work. By his own admission before even attempting a return to work, August asserted he could not maintain any employment. In August, the court held "the record [was] fatally bereft of indication that August possessed the ability to perform his job." Id. at 581.

This is completely dissimilar to the instant action wherein plaintiff King sought employment, was willing and able to work after discharge, and only received "after acquired" benefits following an inability to acquire employment, which "but for" the actions of the defendant at hand would not have been necessary.

In Kennedy v. Applause, Inc., 90 F. 3d 1477 (9th Cir. 1996), plaintiff was diagnosed as suffering from chronic fatigue syndrome. While on medical leave for this disabling condition, Kennedy and her physician submitted evidence to support that she was unconditionally unable to perform any work whatsoever in order to obtain for Kennedy state disability benefits and Social Security benefits.

Kennedy and her doctor offered sworn statements that she was totally unable to perform any work before she was even discharged from her employment. With both Kennedy and her physician attesting to Kennedy's complete inability to perform any job before she was even fired, the Court found her later statements in her civil suit that she was fully

capable of performing her former job inconsistent and irreconcilable with the facts surrounding her application for disability benefits while still employed.

The employer in the instant case cannot in any fair or reasonable manner present even a scintilla of evidence which supports Mrs. King was not satisfactorily performing her job and arriving faithfully each day at work at the precise time she was terminated. Thomas Hospital neither offered disability benefits nor was asked by Mrs. King to provide disability benefits at the time of discharge. More to the point, Respondent cannot rationally ask any Court to simply ignore and disregard the months that Mrs. King sought employment in the local labor market before applying for disability benefits, which unemployment was rooted in being fired by this employer at an advanced age with known physical limitations.

"But for" the employer's unlawful actions, Kermie Marie King could have continued in her employment with the hospital for a number of years, possibly even until full retirement age. Given the circumstances and issues material to this discharge, the SSDI benefits awarded a year or more after the employer's wrongful conduct cannot stand as remotely having reasonable affect or bearing upon the facts of this case to unfairly alter or color this claim of discriminatory acts.

Thomas Hospital not only fired this employee illegally, but clearly at a time in her life when reemployment would be difficult even under the best of circumstances. The award of disability benefits fifteen months after the firing of this woman and based upon the permissible vocational-medical criteria contained in the Social Security Act, can not

equitably dispense with the illegal actions committed by this blameworthy employer nor stand as inconsistent with any assertion made by Mrs. King.

At the time of her termination, Mrs. King was approaching sixty years of age, had limited work skills, was absolutely functioning in full-time employment despite arthritic legs, but after being fired, was inextricably marked by the employer with a work history marred by accusations of gross dishonesty and misconduct. This certainly did not insure reemployment. Thomas Hospital argued this undeniable harm and damage which is totally its sole responsibility, both legally and morally, be simply washed clean and disposed of because the Social Security Act recognized all of these vocational-medical conditions as disabling to a sixty year old employee who following discharge could not acquire substantial gainful work activity in her local community.

The Social Security benefits applied for and awarded to Mrs. King were earned solely by her. The benefits were after acquired benefits arising from and made necessary by the tortious acts of the employer the year before in firing an almost sixty year old woman with no skills and having physical limitations related to aging. Petitioner submits that Thomas Hospital should not now be rewarded for its actions by virtue of the very fruits of the harm and damage it caused.

In Mohamed v. Marriott International, Inc., 94 Civ. 2336 (S. D. NY, 1996), a very thorough and relevant opinion was issued discussing the issues and clear distinctions between the ADA standards and Social Security standards for determining disability. This has significance in consideration of the instant matter. In Mohamed, the Court emphasized

that "disability" for the purposes of receiving Social Security benefits are based on different legal standards, different forums and levels of formality, different goals, and very different definitions of "disability". It was clear from such discussions by this Court that "unable to work" has very broad and far-reaching meanings pursuant to Social Security guidelines and purposes, even to the extent of holding an individual unable to work for purposes of providing benefits while the individual is actually working. For this reason, the Court held that statements on an application for benefits would not bar an ADA claim or be dispositive of the material issues intrinsic to claims of discrimination by an employer.

Instead, that Court clearly held that "[I]t would be inappropriate to invoke the . . . doctrine of judicial estoppel to erect a per se bar to ADA protection for individuals who have also applied for and/or received SSDI benefits". Petitioner states it is no less inappropriate to erect such a per se bar to the legal protections for older workers under ADEA or state anti-discrimination laws. It is factually possible for an older employee to be able to function at a particular job but upon termination, become unemployable and pursuant to the definition of "disability" eligible for Social Security disability benefits.

Additionally, EEOC has issued a Guidance as of February 12, 1997. This Guidance has clearly established that a plaintiff can proceed with a cause of action under ADA even though he or she has applied for disability benefits, including Social Security Disability Benefits. EEOC states that an employee can be both "qualified" under ADA and "totally disabled" for purposes of Social Security, workers' compensation or disability insurance because of the clearly

varying definitions utilized by each. Further, the EEOC holds that, in general, the effect of any disability application is a factual issue requiring consideration by a jury and rendering summary judgment inappropriate.

Courts have rejected judicial estoppel as a bar to causes of action for handicap discrimination under either ADA or the Rehabilitation Act when the plaintiff has sought disability benefits. Overton v. Reilly, 977 F.2d 1190 (7th Cir., 1992); Kupferschmidt v. Runyon, 527 F. Supp. 570, 574 (S.D. Wis. 1993); Smith v. Dovenmuehle Mortgage, Inc., 850 F. Supp. 1138, 1141-43 (N.D. Ill. 1994); Robinson v. Neodata Services, Inc., 94 F. 3d 499 (8th Cir., 1996); and, D'Aprile v. Fleet Services Corp., 92 F. 3d 1 (1st Cir., 1996). In D'Aprile, the court held as follows, "[S]ince D'Aprile never claimed to have been totally disabled during the time she requested her accommodation, and demonstrated her ability to work with the accommodation she requested" her claims are totally consistent and cannot be barred by application of judicial estoppel.

Judicial estoppel has only been applied with extreme caution by courts and has been openly criticized by some. See e.g., Chrysler Credit Corp. v. Country Chrysler, Inc., 936 F. 2d 1509, 1520 n. 10 (10th Cir. 1991); A.F.D. Falck, S.P.A. v. E.A. Karay Co., 131 F.R.D. 46 (S.D.N.Y., 1990); and Dockery v. North Shore Medical Ctr., 900 F. Supp. 1550, 1557-59 (S.D. Fla. 1995).

It has further been clearly held by courts that there may exist legitimate reasons for a plaintiff to take what may appear to be inconsistent positions in different proceedings that certainly do not prove the intent of that plaintiff to play fast and loose with either proceeding.

"As with other principles of fairness, care must be taken that this approach not lead to undue moralizing that may overlook reasonable grounds for changing positions on the basis of new information. Mishkin v. Peat, Marwick, Mitchell & Co., No 80 Civ. 4301, 1988 WL 391648, #1 (S.D.N.Y., Nov. 7, 1988) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedures §4477 at 783 (1981)).

It is also noted that courts have taken cognizance of the potential conflict existing between the underlying principle of judicial estoppel and the Federal Rules of Civil Procedure regarding pleading. Circumspection in the use of judicial estoppel is warranted because of a concern for offending the liberal spirit of the federal pleading rules. Mohamed, supra. Judicial estoppel is in tension with the alternative pleading provisions of Federal Rules of Civil Procedure, Rule 8(e)(2). Bates v. Long Island R.R., 997 F. 2d 1028 (2d Cir.) cert. denied, 510 U.S. 992 (1993).

CONCLUSION

Under the Social Security Act, an individual may be deemed totally disabled pursuant to various criteria or such criteria in combination with one another which does not necessarily establish absolute prima facie evidence of an inability to perform the essential functions of a previous job or the intent of a plaintiff to alter facts to gain some undeserved advantage in litigation. Under 42 U.S.C. §423(d)(2)(A), consideration of age, education and work experience, as well as availability of work in the national economy or in a particular region, is equally determinant of

eligibility for benefits. This can not, by any legal or equitable measure, form the foundation for a per se bar to a claim of discrimination for any plaintiff who is required to apply for and receives Social Security Disability Benefits, particularly following a year of unemployability after being wrongly discharged and by such discharge, having been falsely branded a dishonest employee who committed an egregious act of gross misconduct.

In this matter, the Petitioner was almost sixty years old with limited education, no transferable work skills, and had arthritis of the legs and feet which affected her functional capacities to walk quickly or stand continuously. Despite these limitations, plaintiff satisfactorily maintained her job with Thomas Hospital. The hospital discharged her in the face of such conditions.

It is neither inconsistent nor unreasonable for such a plaintiff to seek disability benefits to support herself in light of her permanent physical impairment and the continuing inability to find gainful employment following an involuntary discharge. This does not prove that plaintiff was unable to perform the essential functions of her previous job, particularly as she was satisfactorily performing her job duties when she was fired. No issue was raised by the employer or the employee at the time of discharge, or at any reasonable time thereafter, that the plaintiff was not performing all of the essential functions of her job, despite having the arthritic condition while employed.

It was held in Bates, supra, that judicial estoppel serves two objectives, which are as follows: (1) preserving the sanctity of the oath by requiring consistency in sworn positions, and (2) protecting judicial integrity by avoiding

inconsistent results in two proceedings.

In this matter, Mrs. King alleged her employer discharged her on the pretextual reason of dishonest conduct which constituted gross misconduct, when in fact, the employer intentionally ended her employment solely because she was advanced in age. Approximately one year after being discharged, plaintiff remained unemployed and consequently applied for Social Security Disability Benefits at age sixty with diagnosed arthritis of her legs and feet. The award of benefits was backdated to the approximate last date on which plaintiff worked. These claims are not mutually exclusive and do not reach any remote level of proof that Mrs. King either falsely swore to inconsistent positions or that she intentionally misled any Court to unjustly create an advantage in either one of these two independent forums.

Certainly, the severely preclusive legal effect of this doctrine demands a stronger foundation in fact and some assurance that its application followed, and is a direct product of, a fair judgment on the merits of the issues and some presentation of relevant evidence, and is not merely an empty per se bar technically invoked by a defendant to deny justice to a wronged plaintiff.

Kermie Marie King was tossing salads, carrying food trays, and performing her assigned tasks in the dietary department at Thomas Hospital on the very day she was openly discharged for alleged dishonest conduct and humiliated by being led out of the hospital in which she had faithfully worked for twenty-five years. She had been performing these job functions despite her arthritic legs and feet. In fact, this hospital allowed Mrs. King to complete her entire work shift before telling her at the very end of the

work day that she was fired and must clean out her locker.

Mrs. King was degraded and defamed by an allegation by Thomas Hospital. At age sixty, she found herself suffering from arthritis, unemployable for months following her termination, and consequently applied for Social Security Disability Insurance Benefits because she could not yet qualify for Social Security Old Age benefits. In applying for these disability benefits months after being fired, Mrs. King could neither diminish nor enhance any of the material issues relevant to the actions taken by her employer. The central issues of age discrimination and wrongful discharge for a pretextual reason were central to this case and should have remained unaffected by an award of SSDI benefits. No fact was altered and no truth shaded by Mrs. King's application for the same to survive having been fired.

Judicial integrity is not threatened by the award of the SSDI benefits in this case but rather is more than directly attacked by the dismissal of this action by the district court in the face of all of the compelling evidentiary facts necessitating that this matter be brought to trial.

Respectfully submitted by:

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Dated: January 28, 1999

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

KERMIE M. KING,
Plaintiff-Appellant,

v.

HERBERT J. THOMAS MEMORIAL HOSPITAL, a non-profit West Virginia corporation,
Defendant-Appellee.

No. 97-1075

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
John T. Copenhaver, Jr., District Judge.
(CA-95-252-2)

Argued: March 2, 1998

Decided: October 30, 1998

Before ERVIN and NIEMEYER, Circuit Judges, and
BROADWATER, United States District Judge for the
Northern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Ervin and Judge Broadwater joined.

COUNSEL

ARGUED: David Stephen Skeen, South Charleston, West Virginia, for Appellant. Charles MacKinley Surber, Jr., JACKSON & KELLY, Charleston, West Virginia, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

Kermie M. King's long-time employment as a dietary aide at the Herbert J. Thomas Memorial Hospital in South Charleston, West Virginia, was terminated on April 9, 1987, because she falsified her time card. Following her termination, King filed this action, claiming, among other things, that Thomas Memorial Hospital discriminated against her by reason of her age in violation of the West Virginia Human Rights Act. That Act requires King to establish that at the time of the defendant's allegedly discriminatory action, she was "able and competent to perform the services required" of her employment. W. Va. Code § 5-11-9(1).

In addition to filing this action, King applied for and was awarded disability benefits by the Social Security Administration, retroactive to one week before her discharge. Finding that King had represented to the Social Security Administration that she had a severe impairment that made her unable to do her previous work as of the time of her discharge, the district court granted summary judgment for Thomas Memorial Hospital on the grounds that King was judicially estopped from asserting that she was "able and competent" to perform her previous job, as required by West Virginia law.

Because we agree with the district court that King should be judicially estopped from maintaining that she was "able and competent" to perform her previous job and because, in addition, we conclude that she has failed to present sufficient evidence to show that she would not have been terminated "but for" her age, we affirm.

I

King's employment as a dietary aide at Thomas Memorial Hospital required her to assist in such food production tasks as tossing salads and delivering food trays to patients. Before her discharge on September 9, 1987, she had worked in this capacity for 25 years.

King's employment at the hospital was regulated by published policies and an employee handbook. The six-page "Policy for Recording

Time Worked and Instructions for Time Card Recording" included the following instruction, printed in all capitals and underlined: "RECORD THE ACTUAL TIME WHEN COMMENCING WORK AND THE ACTUAL TIME WHEN CONCLUDING WORK. (FALSIFICATION OF TIME CARD WILL RESULT IN TERMINATION)." Similarly, the employee handbook listed 30 offenses for which disciplinary action was specified, including "falsification of time card," for which the specified sanction for the first offense was discharge. King acknowledged that she had been aware of these policies before August 1987.

On August 28, 1987, King's immediate supervisor observed King leaving work at 2:20 p.m. and, a few minutes later, getting into her husband's car and exiting the hospital grounds. On her time card, King had signed out as of 2:30 p.m. King's supervisor and her department head subsequently counseled King, who acknowledged leaving early, and issued her a written warning. The warning noted that King's job responsibilities included "deliver[ing] all late trays up to 2:30 p.m." and that the department had "received several complaints about late trays not being delivered at this time." The warning further notified King that any additional occurrences would result in her suspension and would require her to check in with her supervisor before signing out each day.

On review of this written warning, the hospital's director of personnel questioned King about the incident. During the course of this interview, King acknowledged that she had left early on August 28, as well as on several other occasions. She also acknowledged that in each case she had falsified her time card. While King admitted that she knew of the hospital's time card policy and the mandated sanction for falsifying entries, she explained, "I felt others had done the same thing and that is why I did it." The director of personnel changed the sanction on the incident form to "discharge," as required by hospital policy, and then terminated King's employment.

On November 3, 1987, King filed an age discrimination claim with the West Virginia Human Rights Commission, alleging, "I was discriminated against because of my Age, 58, in that . . . [d]ue to a reduction in Patient Census, the [hospital] reportedly plans to reduce the workforce by deleting certain positions." The Human Rights

Commission investigated the charge, and on April 5, 1988, issued a finding of no probable cause to believe that Thomas Memorial Hospital had engaged in unlawful discrimination.

After her discharge, King also applied for Social Security disability benefits based on her physical condition which had manifested itself almost a year earlier. During the year before her discharge, King's doctor had written to Thomas Memorial Hospital on King's behalf, urging that the hospital provide King with a job where she was not required to spend eight hours a day on her feet because she was manifesting early symptoms of "talonavicular osteoarthritis." The hospital responded that it did not have any positions open at that time "that would limit the number of hours on her feet" but that jobs would be posted as they opened. In deposition testimony given in this case, King explained that she made her application for disability benefits because she had become "physically unable there at the hospital" or, as she corrected her statement, "Well, I guess it was after I was discharged from the hospital. . . . I guess it was about in '87, because my legs was giving me problems."

While the record does not contain King's application for Social Security disability benefits, the Social Security Administration awarded disability benefits to her in December 1988, determining that she had been disabled as of September 2, 1987, a week before the termination of her hospital employment. In its notice of award, the Social Security Administration explained that "[t]he decisions we made on your claim are based on information you gave us" and that these decisions were made by "doctors and other trained personnel." It also advised King that her health might improve and that therefore her case would be reevaluated in three years. King continues to receive Social Security disability benefits, as well as a pension for early retirement from Thomas Memorial Hospital.

After the West Virginia Human Rights Commission provided King with a right to sue notice, she filed this action in a West Virginia state court, and the hospital removed the case to federal court. In her amended complaint, King alleged (1) age-based employment discrimination in violation of the West Virginia Human Rights Act, (2) breach of contract, (3) intentional infliction of emotional distress, and (4) interference with retirement benefits in violation of the federal

Employee Retirement Income Security Act (ERISA). The district court dismissed the last three counts because they were barred by the statute of limitations. On the age discrimination claim, the court applied judicial estoppel to bar King's assertion of a necessary element of her claim. The court concluded that King's "representation[s]" to the Social Security Administration concerning her disabled condition estopped her from maintaining her age discrimination claim, a claim which required her to prove that she was "able and competent to perform the services required" of her employment. W. Va. Code § 5-11-9(1). While King's application for Social Security benefits was not before the court, the court noted that in order to establish her Social Security claim, King had to represent that she had "a severe impairment that made her unable to do her previous work as of September 2, 1987." Moreover, the award itself indicates that it was based on information and medical evidence submitted by King. The court reasoned that King could not make the showing under the West Virginia Human Rights Act that she was "able and competent to perform the services required" and at the same time present a claim for disability benefits that she was "unable to perform her previous work," and noted, "[T]he circumstances of this case strongly suggest that plaintiff is merely 'blowing hot and cold as the occasion demands.'"

This appeal followed, challenging only the district court's entry of summary judgment against King on her West Virginia age discrimination claim.

II

To establish a claim for unlawful age discrimination under West Virginia law, a claimant must demonstrate, among other matters, that she "is able and competent to perform the services required" of her employment with or without accommodation. W. Va. Code § 5-11-9(l); *see also Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Comm'n*, 431 S.E.2d 353, 357-58 (W. Va. 1993). This requirement is consistent with the West Virginia Human Right Act's preference for injunctive relief and reinstatement. *See* W. Va. Code § 5-11-13(c). In this case, the district court determined that King was judicially estopped from satisfying the "able and competent to perform" requirement because she took the inconsistent

position before the Social Security Administration that she was disabled and could not perform her previous job. The court inferred, based on the Social Security Administration's decision, that "plaintiff not only made the representation that she had a severe impairment that made her unable to do her previous work as of September 2, 1987, but that she also submitted medical evidence in support of that representation."

Challenging that ruling on appeal, King contends that the district court erred because it failed to recognize that a Social Security disability finding reflected not her inability to perform her job as a dietary aide, but rather her "unemployability due to her age, limited work skills, education, and incapability due to arthritic feet and legs." She argues that there is nothing factually or legally inconsistent about her asserting both that she was able to meet the requirements of her job at the time of her termination, as required under the West Virginia Human Rights Act, and also that she became disabled one week prior to her termination for purposes of receiving Social Security disability benefits.

Before addressing whether King in fact took inconsistent positions before the Social Security Administration and in her state discrimination claim in this case, we should review the applicable principles of judicial estoppel, upon which the district court relied.

Judicial estoppel, an equitable doctrine that prevents a party who has successfully taken a position in one proceeding from taking the opposite position in a subsequent proceeding, is recognized to protect the integrity of the judicial system. *See Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) ("'The purpose of the doctrine is . . . to protect the essential integrity of the judicial process'" (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 28-29 (4th Cir. 1995)); *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 616 (3d Cir. 1996) ("The doctrine . . . serves a consistently clear and undisputed jurisprudential purpose: to protect the integrity of the courts"); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 191-92 (7th Cir. 1995) ("[C]ourts are under no compulsion to heed the shifting theories of 'chameleonic litigants'"). Acting on the assumption that there is only one truth about a given set of circumstances, the courts apply judicial estoppel to prevent a party from benefiting itself by maintain-

ing mutually inconsistent positions regarding a particular situation. As we have previously observed, the doctrine is invoked to prevent a party from "playing fast and loose with the courts," from "blowing hot and cold as the occasion demands," or from attempting "to mislead the [courts] to gain unfair advantage." *Lowery*, 92 F.3d at 223, 225 (citations omitted). As an equitable doctrine, judicial estoppel is invoked in the discretion of the district court and with the recognition that each application must be decided upon its own specific facts and circumstances. *See, e.g., McNemar*, 91 F.3d at 617.

We have recognized the necessity of establishing at least three elements to apply the doctrine: (1) The party to be estopped must be asserting a position that is factually incompatible with a position taken in a prior judicial or administrative proceeding; (2) the prior inconsistent position must have been accepted by the tribunal; and (3) the party to be estopped must have taken inconsistent positions intentionally for the purpose of gaining unfair advantage. *See Lowery*, 92 F.3d at 224; *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166-67 (4th Cir. 1982). But judicial estoppel will not be applied where the party's inconsistent positions resulted from inadvertence or mistake. *See Lowery*, 92 F.3d at 224; *Clark Co.*, 65 F.3d at 29.

In this case, West Virginia law requires King to establish as part of her age discrimination case that she was "able and competent" to perform the services required of her employment as a dietary aide at Thomas Memorial Hospital. The question presented, therefore, is whether she was properly estopped from establishing that element by reason of the position she took before the Social Security Administration in making a claim for disability benefits.

The record reveals that during the year before her discharge from the hospital, King was suffering from early stages of osteoarthritis, making it difficult for her to stand for long periods of time, as was necessary in performing her work as a dietary aide. The hospital advised her that it could not accommodate her claimed need to spend less time on her feet, but it suggested she could apply for a suitable position when one became available. Following her discharge in September 1987, King filed a claim with the Social Security Administration for disability benefits based on this disability, and the Social

Security Administration awarded her benefits based on the information King provided, effective one week before her discharge.

The Social Security Administration's finding of disability necessarily meant that it had found, based on information supplied by King, that King was unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 42 U.S.C. § 423(d)(1)(A). More specifically, the Social Security Act directs that "[a]n individual shall be determined to be under a disability only if [her] physical or mental impairment or impairments are of such severity that [she] is *not only unable to do [her] previous work* but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added). The burden of proof lies with the claimant, who "shall not be considered to be under a disability unless [she] furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require. . . . Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques . . . must be considered in reaching a conclusion as to whether the individual is under a disability." 42 U.S.C. § 423(d)(5)(A).

King makes the argument that a Social Security Administration finding of disability could be based on a more general finding of unemployability due to her age, limited work skills, education, and incapacity due to her arthritic feet and legs. The age, skills, and education factors, however, relate only to whether King could engage in "any other kind of substantial gainful work which exists in the national economy." To award King disability benefits, the Social Security Administration would necessarily have had to conclude first that King was "unable to do [her] previous work," either because of a physical or a mental impairment.

Moreover, in this case, there is no mystery about the basis of King's disability. She explained in deposition the position she took before the Social Security Administration, testifying that she was disabled because of arthritis in her legs at the time of her discharge. She stated repeatedly that she was not "physically able to work," that "I really become physically unable there at the hospital," and that she

became "unable to work from a physical standpoint . . . after I was discharged from the hospital." In addition, even though the Social Security Administration's award to King provided for a review of her condition after three years, at the time of her deposition eight years after her discharge from the hospital, King was still receiving disability benefits.

The pertinent facts may thus be summarized: (1) King has taken the position before the Social Security Administration that she was physically unable to do her previous job as a dietary aide; (2) she claimed that she became so disabled around the time of her discharge in September 1987; (3) the Social Security Administration necessarily determined that she was "unable to do her previous work" at Thomas Memorial Hospital; (4) based on her representations, she benefited herself by obtaining from the Social Security Administration an award of disability benefits; and (5) she continues to assert under oath that she was disabled and she continues to receive disability benefits, which indicate that her position was deliberately and not inadvertently taken. Upon these facts, we agree with the district court that King is judicially estopped from asserting, as required for her West Virginia age discrimination claim, that she was "able and competent" to perform her previous work at the hospital at the time of her discharge. *See* W. Va. Code § 5-11-9(1). To allow King to obtain benefits from two sources based on two incompatible positions, simply because the positions aid her claims for remuneration, would reduce truth to a mere financial convenience and would undermine the integrity of the judicial process. In the factual circumstances of this case, we conclude that the district court was well within its discretion in applying judicial estoppel to preclude King from asserting a necessary element of her West Virginia age discrimination case.

III

In addition to the requirement that King demonstrate that she was "able and competent" to work at her employment to prove an age discrimination case under West Virginia law, she must establish that "but for" her age (58), she would not have been fired. *See Conaway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423, 429 (W. Va. 1986). To satisfy this requirement, and thereby shift the burden of production to the hospital, she would have to "show some evidence which would

sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion." *Id.* at 429-30 (footnote omitted); *see also Barefoot v. Sundale Nursing Home*, 457 S.E.2d 152, 161 (W. Va. 1995) (explaining that "but for" test is "merely a threshold inquiry, requiring only that a plaintiff show an inference of discrimination").

The only evidence on this issue that King offered was a paper in longhand from her personnel file on which calculations were made in March 1987 showing that the amount of her pension at her early retirement date of May 1, 1987, was less than half of the pension that she would receive at her normal retirement date on May 1, 1994. King states that she did not request that information and that it was prepared without her knowledge. The inference she seeks to draw from the existence of these calculations is that the hospital discharged her six months later because it wanted to reduce its future pension liabilities.

We fail to appreciate how these calculations, made in March 1987, are linked through any evidence to the decision to fire King in September 1987. But even if this evidence shifted the burden to the hospital to produce a valid, nondiscriminatory reason for terminating King, *see Conaway*, 358 S.E.2d at 430, the hospital presented evidence that it discharged King for falsifying her time card on August 27, 1987, a fact that King admitted and which required, as a matter of preestablished policy, that she be discharged. When confronted with this evidence, King had to meet the ultimate burden of proving that the reason given by the hospital was "merely a pretext for discriminatory motive." *Conaway*, 358 S.E.2d at 430 (footnote omitted).

King argues that the affidavit of a former co-worker, which she offered in opposition to summary judgment, established that it was hospital policy to allow employees a "grace period" of five to seven minutes at the start and finish of each workday and that therefore there must have been some other reason for her discharge. This affidavit reported that the former employee had observed food production employees sign out and leave work five to ten minutes earlier than the scheduled quitting time, and stated that this grace period was provided as part of a "long standing formal and later informal hospital

and dietary department policy." This affidavit, however, does not indicate that Thomas Memorial Hospital tolerated the *falsification of time records*. On the contrary, the evidence showed that the falsification of time records was a serious violation, requiring dismissal of the falsifying employee. Moreover, the hospital presented uncontradicted testimony that at least 15 other employees who had falsified their time records were discharged from their employment at the hospital, and only one of these other discharged employees was 40 years of age or older.

In short, we conclude that no reasonable jury could find that King's termination was the result of unlawful age-based discrimination on the part of the hospital.

For the reasons given herein, the judgment of the district court is hereby affirmed.

AFFIRMED